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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

RONALD COULTER AND ANISSA COULTER, et al.,

Petitioners,

SHERRY HORTON, et al.,

Plaintiffs-Respondents,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Defendant-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do judicial comity, States' sovereignty, and the McCarran-Ferguson Act preclude a United States District Court from regulating insurance sales in and among the several states by approval of a settlement of a Federal class action suit?

PARTIES TO THE PROCEEDING

The petitioners in this case are Ronald Coulter, Anissa Coulter, Douglas Connor; Roena Connor; Darrin Johns; Joann Kablach; Eric Maharg; Terrance McConnell; Deborah Myers; Terry Palmer; Marjorie Palmer; Brian Rohm; James Romano; Mary Romano; Albert Darren Wise; Jeanne Yokel; Edward Beliunas; Paulette Beliunas; John Brooks; Stephanie Charles; Shelly A. Daughenbaugh; Jerilyn Freiwald; Nina Heathcote; Daniel Heathcote; Robert W. Hemcher; Kenneth D. Johnson; Michele R. Johnson; Frieda E. Kamel; Jerome J. Knorr; Enod S. Knorr; George Liptak; Ruth Liptak; Kenneth J. Magnes; Sandra Marie McCue; Mark A. Ondrusek; Ernestine Peterson; Rori K. Rasel; Clarence Ridgeway; Emily N. Riehl; Joan C. Valenta; Robert Dale Wiles; and Catherine Wiles. All other parties to the instant proceeding are set forth in the caption on the cover of this petition.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Ronald Coulter and Anissa Coulter, et al. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The reported opinion of the court of appeals (App. 4a) is reported at 78 F3d 1533 (11th Cir. 1996). The opinion of the district court (App. 83a [pages omitted]) is unreported.

JURISDICTION

The court of appeals entered its judgment on April 2, 1996 (App. 4a), and a timely petition for rehearing was denied on May 15, 1996 (App. 44a). An extension until September 13, 1996 for the filing of this writ was granted on (App. 75a). A second petition for rehearing was denied on August 19, 1996 (App. 44a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT

This case involves the avoidance of an irreconcilable confrontation between the Congress of the United States and the Supreme Court of the United States over the sovereignty of the States as expressed by the Congress of the United States in the passage of the McCarran-Ferguson Act.

Presently, there are two Multi-District Litigation Panels specifically addressing fraudulent insurance sales practices handling nationwide class actions, numerous nationwide class actions filed against numerous insurance companies, other than the two defendants in the M.D.L.s, and scores of individual cases filed in federal courts across the country, all alleging fraudulent sale practices of insurance agents. These cases encompass hundreds of thousands of individuals who have been defrauded, with claims worth hundreds of millions of dollars. All of these cases are impacted upon by the model created by the decision of the United States Court of Appeals for the Eleventh Circuit in the instant case, which ignores the mandates of the regulation of the business of insurance as set forth by Congress in the McCarran-Ferguson Act.

The United States District Court for the Middle District of Florida, Tampa Division and the United States Court of Appeals for the Eleventh Circuit, (hereinafter Eleventh Circuit) in the instant case, have placed the powers of the several States to regulate the business of insurance, in jeopardy, by decision contrary to the plain meaning of the McCarran-Ferguson Act, restricting the

federal regulation of the business of insurance, which is to be done by the individual states. (App. 83a) Metropolitan Life Insurance Company's sales office in Tampa, Florida was engaged in the sale of retirement plans to nurses on a nationwide basis. The problem was that the retirement plans sold to the nurses, were not retirement plans, they were whole life insurance policies. The Tampa based Metropolitan agents did not disclose to the nurses that they were actually receiving life insurance. They specifically did not even mention the word insurance during the sales' presentation of the retirement plan. (App. 58a-59a)

Additionally, other sales offices throughout the United States, including Pennsylvania, were involved in other fraudulent insurance sales practices, which included the replacement of policies, selling of retirement plans, selling of savings plans, selling college education savings plans, all for the purpose of the agents making a commission, not for legal, proper insurance needs and purposes.

Specifically, in the spring of 1991, Pennsylvania licensed Metropolitan agents began selling various retirement and savings plans to Pennsylvania citizens. Factually distinct from how the Florida agents sold the nurses retirement plans, is that the Pennsylvania agents disclosed to the purchasers that there was an insurance component to the retirement/savings plan. Accordingly, the consumers expected to receive a life insurance policy as part of the retirement plan. (App. 59a)

Thus, when they had a medical check-up, were given a blood test and received a life insurance policy, they were not surprised, because that was a part of the entire "deal" that was offered by the Pennsylvania Metropolitan agents.

In the Commonwealth of Pennsylvania, Pennsylvanian licensed Metropolitan agents sold to Pennsylvania citizens policies that had allegedly been approved by the Pennsylvania Insurance Commission. Between 1991 and 1993, Metropolitan sold several

hundred thousand life insurance policies in Pennsylvania that were not pre-approved by the Pennsylvania Insurance Commission, and when reviewed, were found not to comply with the requirements of the Insurance Commission. (App.intervention)

The Pennsylvania Insurance Commission conducted a Market Conduct Survey on the sales practices of Metropolitan Life in the Commonwealth of Pennsylvania and found Metropolitan in direct violation of Pennsylvania Insurance Law and fined Metropolitan for the violations. Additionally, the Insurance Commissioner directed Metropolitan to make restitution to the Pennsylvania citizens who had been defrauded. (App. 103a) This includes the Pennsylvania members of the Horton class, as well as the Petitioners herein. There was no limitation placed upon the Pennsylvania Metropolitan policyholders, as required in Horton.

To establish federal jurisdiction, the Horton court based its jurisdiction on federal question jurisdiction pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO). (App. 10a, 34a)

How a federal district court came to entertain a nationwide class action involving alleged misrepresentations in the sale of insurance company products is a mystery? The case apparently began with a RICO claim to establish jurisdiction, but RICO clearly does not apply to the business of insurance, since it is silent on the subject. Surely, filing of a faulty RICO suit should not give rise to a nationwide class action suit against an insurance company in the teeth of the McCarran-Ferguson Act.

The Pennsylvania Plaintiffs had filed a class action suit against Metropolitan Life Insurance Company in a Pennsylvania State Court, as would seem to be proper under the McCarran-Ferguson Act. The Pennsylvania Plaintiffs also filed a motion for intervention in Horton, (App.intervention) requesting that a subclass be created for the Pennsylvania residents, or in the alternative that the Pennsylvania residents be severed from the

nationwide class action suit in the Federal District Court for the Middle District of Florida, Tampa Division. This motion was denied.

Instead, the District Court approved a negotiated class certification which embraced putative class members in every State of the Union, regardless of the insurance regulatory laws of the several States. (App. 11a)

The Pennsylvania Plaintiffs appealed this case to the Eleventh Circuit, (App. 4a) which denied the appeals and, without notice or hearing, sanctioned the Pennsylvania Plaintiffs, branded the appeals as "frivolous" and imposed double costs and attorney fees.

1. The Nationwide Class Action and Settlement of Horton. A nationwide class action was filed pursuant to Rule 23 of the Federal Rules of Civil Procedure against Metropolitan Life Insurance Company in Federal Court in Tampa, Florida, Horton, et al. v. Metropolitan in November of 1993, (designated by the 11th Circuit as Grilli, but known to all counsel and the Courts as Horton, hereinafter referred to as Horton). (App. 4a)

Within four months of filing of this nationwide class action, in April 1994, the District Court approved the sending of a Class Notice of Settlement and Proof of Claim Form. Then in July of 1994, held a fairness hearing on the terms of the settlement. (App. 11a)

On October 25, 1994, over the objection of the Petitioners, the District Court approved the settlement class and the terms of the settlement. (App. 11a)

The Petitioners objected to their inclusion in the settlement class, because they requested that their state claims and remedies, available to Pennsylvania residents for the regulation of the business of insurance in Pennsylvania, should be available to them as citizens of Pennsylvania. (App. 101a)

The District Court approved a settlement after a time lapse of only four months in which the only compensation to class members was the refund of premiums plus interest; whereas, the attorney fees awarded to the class counsel were $2,750,000.00 (two million seven hundred fifty thousand dollars). (App. 37a)

2. The Intervention of the Petitioners. How the Petitioners made the District Court aware of their lawsuit filed in Pennsylvania, was through the filing of a petition to intervene, filed in May of 1994. The Petitioners had filed their own statewide class action in Pennsylvania State Court in March of 1994, Coulter v. Metropolitan Life, (hereinafter referred to as Coulter). (App.intervene) Metropolitan, based on diversity of citizenship, then removed the case to the Federal District Court in the Western District of Pennsylvania.

In Coulter it was asserted that Metropolitan violated Pennsylvania statutory laws as well as Pennsylvania common law, which apply to Pennsylvania's right to regulate the business of insurance and to protect its citizens from fraudulent insurance sale practices.

The purpose of the intervention was two-fold, the first was to inform the Federal Court in Tampa of the existence of their case, and the second was to determine if the Federal Court in Tampa would afford the Coulter's any relief based upon their Pennsylvania claims. (App. 101a)

Specifically, the Coulters requested to intervene in Horton to form a subclass of residents in order to insure that these Pennsylvania residents were provided protection afforded to them under the laws of Pennsylvania or in the alternative to exclude themselves as potential class members from the Horton case. (App. 101a)

The District Court, by Order of October 25, 1994, refused to allow intervention on behalf of the Petitioners, to exclude

petitioners as class members, or to create a subclass, even though petitioners had previously commenced a class action suit against Metropolitan Life Insurance Company in the Commonwealth of Pennsylvania, thus showing their intent to proceed on their own. (App. 11a)

The District Court denied the intervention and also approved the exclusion of the Pennsylvania plaintiffs from acting as a subclass representatives, because the Court found there was not any need for subclasses, since no States' laws were applied. (App. 97a)

The District Court also denied the request to opt-out on the basis that it was too late, that it would prejudice Metropolitan, and that it may impair the settlement and orderly disposition of the suit. (App. 83a)

In the District Court's rush to judgment, which only took a few months, the Court approved the nationwide class action and specifically rejected the application of any state law to the claims, and instead applied the law of Federal Class action settlements. (App. 97a)

3. **The Appeal to the Eleventh Circuit.** The Coulter Petitioners, then filed four appeals to the Eleventh Circuit. (One appeal for each order entered denying relief.) The appeals were consolidated for purposes of briefing and argument.

The Eleventh Circuit affirmed the District Court, found the appeal to be frivolous and in contradiction to F.R.A.P. 38, also entered sanctions of attorneys fees and double costs against the Petitioners, without any advance warning by the court, or any motion filed by the Respondents. (App. 18a)

The Petitioners requested rehearing based upon asserted errors of law and fact contained in the Opinion of the Court, which were denied. (App. 46a)

Metropolitan filed a petition requesting clarification as to who would be responsible to pay the attorney's fees and costs. The Court determined that liability would be joint and several for the same. (App. 2a)

Interestingly, on September 4, 1996, two years after the Class Notice and Proof of Claim Form was approved by the District Court, and after the sanction order, Metropolitan has admitted that it did not send the Class Notice and Proof of Claim form to 5,700 members of the class.

One of the named petitioners, Frieda Kamel, specifically had asserted to the District Court that she did not receive a class notice and should not be included in the Horton class. Two years later, after she has been sanctioned by the Eleventh Circuit, along with the rest of the Petitioners, Metropolitan is now admitting that she did not receive notice. Metropolitan heatedly opposed her, and both courts accepted Metropolitan's assertions and rejected Frieda Kamel's assertions. Metropolitan now admits that she was correct from the outset.

Even with the "discovered" other 5,699 members of the Horton class that did not receive notice in 1994, now being admitted of record by Metropolitan, the District Court has not sua sponte appointed a master at Metropolitan's expense to determine the cause of this oversight and to report on the efficacy and diligence of Notification.

The District Court found that Frieda Kamel was a class member and that she had no right to opt-out, even though, as Metropolitan has now pointed out, she never was notified of the right to opt-out, prior to June 13, 1994, the last day that she was allowed to opt-out, pursuant to the District Court's order approving the Class Notice. (App. 83a)

4. The Nationwide Injunction in Horton. The District Court has also enjoined any other litigation in the United States, that might be brought asserting any claims in any court to protect the settlement order -- thereby, regulating the "business of insurance". This may be construed that any whole life insurance policy sold between 1991 and 1993, whether it was sold as a retirement plan, or not, is controlled by the injunction. (App. 77a)

5. Two Petitions for Rehearing before the Eleventh Circuit. After the Opinion of the Eleventh Circuit was published, the Petitioners filed a Petition for Rehearing on the basis of correcting several important factual inaccuracies contained in the opinion of the Court, that if corrected, should have been grounds for the Court to reconsider its position. Amongst others, the Court found the appeal as frivolous, because the there was no legal basis for the actions of the Petitioners. The Petitioners included specific references to the treatise of Newberg and Conti on Class Actions, which recommended the exact actions that the Petitioners had taken. All the Petitioners had done was follow the directions of the treatise, which is considered the bible on class actions, yet the Court found this to be frivolous. Additionally, the issue was also raised that the sanctions were violative of not only the Rules and commentary of the Appellate Rules of Procedure, but that to award them without any prior notice or hearing has been found to be violative of due process. The Court Denied the Petition without comment.

The second Petition for Rehearing was filed based upon the then new decisions of B.M.W. of North America v. Gore, 116 S.Ct. 1589 (1996), (this was a decision on the principles of judicial comity and the sovereignty of the several States), and the Third Circuit's decision in Georgine v. Amchem, 83 F.3d 610 (1996), (the Third Circuit, reviewed the propriety of the procedure in approving settlement classes under Fed.R.Civ.Pro. 23), neither of which was before the Eleventh Circuit at the time it rendered its

Opinion and Order. The issue of McCarran-Ferguson Act and its relation to federal regulation of the business of insurance was also raised. This Petition was also denied without comment.

6. Extension of Time Granted on the Filing Date of this Petition for Allocatur. The Petitioners sought and received from Justice Kennedy an extension of time to file this Petition for Allocatur until September 12, 1996, to afford the Eleventh Circuit the opportunity to review the B.M.W. and Georgine decisions. This extension was granted.

7. The Ruling of the Eleventh Circuit Ignores the Mandate of Congress, Prohibiting the Federal Regulation of the Business of Insurance. The District Court's and the Eleventh Circuit's rulings, unless checked by the Supreme Court of the United States, will cause a confrontation between the Congress of the United States and the Supreme Court of the United States over the authority of the Congress to regulate commerce, "the business of insurance" as expressed in the McCarran-Ferguson Act.

It is critically important for courts, litigants and insurance regulators across the country to know whether the Eleventh Circuit's decision is right or wrong. Under the Eleventh Circuit's rule, insurance companies can avoid the entire regulatory schemes of the several States which were established in reliance to the mandate of Congress via the McCarran-Ferguson Act.

If the Eleventh Circuit is wrong, but its ruling remains unreviewed, the decision will create confusion amongst all of the circuits, including the two Multi-District Litigation Panels which are based upon improper sales tactics of life insurance agents, as well as the numerous nationwide class actions and other cases filed in federal court against other life insurance companies that are looking at these exact same issues and are reviewing the Horton decision as a possible model of how to handle the nationwide class actions. The decision of the Eleventh Circuit, if followed, will destroy the congressional limitations set forth in the McCarran-

Ferguson Act.

In the one M.D.L., located in the Western District of Pennsylvania, the same defendant as in the Horton case is the defendant: Metropolitan Life Insurance. In the other M.D.L. in the District Court of New Jersey, the defendant is Prudential Insurance. Both of the M.D.L.s effect hundreds of thousand of insurance consumers nationwide, as there are several nationwide class actions filed asserting various fraudulent sales schemes.

If the Eleventh Circuit is correct, and its approach is adopted and Horton is allowed to stand, it will be a devastating blow to the state regulation of the insurance industry as we now know it. The insurance companies will now be regulated by federal district courts via federal nationwide class actions. This allows the insurance companies to escape the regulatory schemes and state-by-state scrutiny of the insurance commissioners.

If the Pennsylvania Petitioners/Plaintiffs are deprived of their Pennsylvania claims and remedies, this would be federal preemption in the most extreme form, contrary to the intent of Congress as expressed in the McCarran-Ferguson Act. If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so, "unmistakably clear". This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers of which Congress does not readily intervene or usurp.

In the instant case, the only plain statement made by Congress is that regulation of the "business of insurance" shall be done by the several States.

The District Court in Horton, in denying the relief requested of the Petitioners of Pennsylvania claims and remedies, ordered the settlement of the nationwide class action pursuant to Rule 23 of the Federal Rules of Civil Procedure, specifically finding that the Court was not applying the law of any state, but

rather as to the fairness and adequacy of the settlement was applying "the federal law governing class certification and settlement approval". "... The Court therefore does not need to resolve the constitutional limits on the application of state choice-of-law principles. ..."(App. 97a)

The Petitioners respectfully submit that this series of events adds up to an effort by Metropolitan Life Insurance Company to evade its obligations under the McCarran-Ferguson Act to comply with the regulatory laws of the several States through settlement of a questionable Federal class action suit. This close-to-the-vest settlement denied Pennsylvania plaintiffs of representation among the class representatives and thereby of participation in the negotiations, and also denied them of their choses in action under Pennsylvania law, which permits compensatory, statutory, and punitive damages. These Pennsylvania statutes include the Pennsylvania Unfair Trade Practice and Consumer Protection Law, 73 P.S. §201.1, et seq., and the Pennsylvania Bad Faith Insurance Statute, 42 Pa. C.S.A. §8371.

This Court should grant review to clarify the governing standard and prevent the enormous waste of both judicial, legislative, regulatory and private resources that is the inevitable real world result of the Eleventh Circuit's ruling. It is unknown what will the reaction be in Congress, but it will shake the foundations of our Constitutional system and the separation of powers.

REASONS FOR GRANTING THE PETITION

This case presents the issue of a direct and serious clash between the Congress of the United States and the statutorily created courts of the federal judicial system. It would be fair to say that this case runs to the very foundations of our Constitutional form of government. The case involves federal government regulation of improper practices in the marketing of insurance products, a subject on which this Honorable Court and the

Congress of the United States have taken historic actions.

A decision is required by your Honorable Court to wisely prevent what appears to be an oversight of significant congressional legislation. The McCarran-Ferguson Act directs that the "business of insurance" and the regulation thereof to be the province of the states.

The District Court of the Middle District of Florida, Tampa Division, with the approval of the United States Court of Appeals for the Eleventh Circuit United States Court of Appeals, in a settlement class action order, has ignored the McCarran-Ferguson Act and regulated the sale of insurance in the Commonwealth of Pennsylvania and nationwide, while approving a class settlement that encompassed insurance sales regulated in Florida and Pennsylvania and the rest of the several states.

The order of the District Court entered October 25, 1994, (App. 83a), affirmed April 2, 1996 (App. 4a) by the Eleventh Circuit United States Court of Appeals, is also a breach of comity and of States' Sovereignty, so recently stated in BMW v. Gore, 116 S.Ct. 1589 (1996).

The McCarran-Ferguson Act Precludes a District Court from Regulating Insurance Sales in and among the Several States by Approval of a Settlement of a Nationwide Federal Class Action Suit.

A. The McCarran-Ferguson Act precludes the regulation of the business of insurance by court decisions based on substantive law.

The Congress of the United States has passed the McCarran-Ferguson Act, 15 U.S.C.A. 1011-1015, c.20, 59 Stat. 33, March 9, 1945, which specifically prohibits the regulation of the business of insurance by the federal government, and has specifically legislated that the regulation of insurance lies

specifically within the province of the individual states. This national public policy reflects the Constitutional principles of State sovereignty and comity among the States.

§1011 of the Act is headed "Declaration of policy" and states:

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

§1012 states:

"Regulation by State law; Federal Law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948.

(a) The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State, for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance ..."

Although the McCarran-Ferguson Act was triggered by a decision of this Honorable Court in the field of anti-trust law, the scope of the Act is much broader than the anti-trust field. The legislative history of the Act bears this out. The Report of the House Committee on the Judiciary, House Report No. 113, February 13, 1945, makes this very clear by concluding that "the enactment of this bill will (1) remove the existing doubts as to the right of the States to regulate and tax the business of insurance and (2) to secure more adequate regulation of such business."

Likewise, the discussion of the legislation on the floor of the Senate casts light on its broad sweep. 91 Congressional Record

1443 and 1481 (1945).

The breadth of the Act has subsequently been illuminated by judicial case law. For example, this Honorable Court in FTC v. National Casualty Co., 357 U.S. 560 (1958), held that advertising by insurance companies to promote the marketing of insurance products came within the purview of the McCarran-Ferguson Act.

B. The individual states have a strong rationale to regulate the fraudulent conduct of an insurance company doing business within that state.

In Pacific Mutual Life Insurance Co. v. Haslip, 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991), the Supreme Court found that a State has a strong interest to protect its citizens from fraudulent conduct of an employee of an insurance company and the State can protect its citizens through regulation of insurance by an award of both compensatory and punitive damages. We quote:

> Alabama's common-law rule is that a corporation is liable for both compensatory and punitive damages for the fraud of its employee effected within the scope of his employment. We cannot say that this does not rationally advance the State's interest in minimizing fraud. Alabama long has applied this rule in the insurance context, for it has determined that an insurer is more likely to prevent an agent's fraud if given sufficient financial incentive to do so. See British General Ins. Co. v. Simpson Sales Co., 265 Ala. 683, 688, 93 So.2d 763, 768 (1957).

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, at 14; 111 S.Ct. 1032, 499 U.S. 1 (S.Ct. 1991)

C. Principles of comity and states' sovereignty require that a federal court respect and not supersede state regulation of the 'business of insurance'.

Recently, judicial restraint and comity have been urged with respect to state sovereignty in the regulation of state laws and their enforcement through civil action for compensatory and punitive damage awards. In BMW v. Gore, 116 S.Ct. 1589 (1996) the power of the courts to enforce the State's right to regulate any business is limited to the State's authority within the boundaries of that State. The Supreme Court has found that a State has the authority to regulate the commerce of business within the State, but that is where the State's authority ends. The State cannot regulate the conduct of business beyond the State's boundaries. Quoting BMW v. Gore, Supra:

> ...by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. ...

BMW v. Gore, 116 S.Ct. 1589, 1597 (1996).

The award by a court of compensatory and punitive damages pursuant to state law are a form of State regulation. Further from BMW v. Gore, Supra:

We think it follows from these principles of state sovereignty that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors

lawful conduct in other States. State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Times Co. v. Sullivan, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d 686 (1964)("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)("regulation can be as effectively exerted through an award of damages as through some form of preventative relief").
BMW v. Gore, 116 S.Ct. 1589, ft. nt.17 (1996)

Concerns of federalism and judicial restraint counsel that the federal courts should not legislate to the States what form the deterrence should take, i.e. the amount of damages, and should they be only compensatory and not punitive.

BMW v. Gore, supra, exemplifies the comity and states sovereignty that must be respected by federal courts as well as state courts.

D. The 'business of insurance' is interstate commerce that the Congress intends to be regulated by the states. This intent should not be frustrated by the procedural mechanism of F.R.C.P. 23.

The Supreme Court of the United States has directed caution and forbearance in general before overriding state law and state concerns. In viewing the scope of federal regulation versus state regulation the Supreme Court of the United states has found in Gregory v. Ashcroft, that:

> ... it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. Atascadero,

> supra, at 243. We explained recently: "If Congress intends to alter the `usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). .... This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 111 S.Ct. 2395, 501 U.S. 452 Page 452 (S.Ct. 1991).

Here the district court with the approval of the circuit court has acted contrary to history, comity States' sovereignty, and the McCarran-Ferguson Act. We quote the district court:

> ... The Court has not applied Florida law to Pennsylvania residents' claims; nor has it attempted to adjudicate the merits of plaintiffs' claims. The only issue before the Court is the fairness and adequacy of the settlement -- an issue controlled by federal law governing settlement class certification and settlement approval. The Court therefore does not need to resolve the constitutional limits on the application of state choice of law principles. ... (App. 97a)

The plain reading of the McCarran-Ferguson Act, clearly demonstrates that Congress wants the regulation of the 'business of insurance' to take place in the States, by the States and not by the federal government or the federal courts. A procedural rule, F.R.C.P. 23 cannot and does not give to the court authority to ignore the McCarran-Ferguson Act and the Constitutional role of

Congress. The District Court has taken F.R.C.P. 23 and used it as a tool for ignoring the congressional injunction against Federal regulation of the "business of insurance".

Conclusion

One of the Petitioners has very recently been mailed printed material giving notice of an opportunity to opt-out, two years after it had been represented to the courts below that all parties had been given notice. The District Court very strongly set forth the rigidity of the requirements for such notices in our class action suit. This is another compelling reason for review of this case. If this Petition is not granted, the unseemly result will be to have claims by Pennsylvania citizens based on Pennsylvania insurance regulatory laws made against the New York insurance company foreclosed by action by a United States District Court in Tampa, Florida, presumably applying either Florida law or federal procedural law of settlement of class actions, F.R.C.P. 23. They do not provide the remedies available under Pennsylvania law.

Petitioners respectfully submit that this is a very important case for the future regulation of the 'business of insurance' in this nation, but also for the future adjudication of Federal class action suits in this nation, and that this Honorable Court should grant this Petition in order to establish clear-cut standards in these major fields of law.

Respectfully submitted,

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